

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

FEB 26 2008

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

SWA PAINTING, INC.,

Plaintiff - Appellee,

v.

GOLDEN EAGLE INS. CO.,

Defendant - Appellant.

No. 06-15817

D.C. No. CV-03- 02364-PHX-  
DGC

**MEMORANDUM\***

Appeal from the United States District Court  
for the District of Arizona  
David G. Campbell, District Judge, Presiding

Argued and Submitted February 12, 2008  
San Francisco, California

Before: **THOMAS** and **BYBEE**, Circuit Judges, and **BLOCK**,\*\* District  
Judge.

Golden Eagle Insurance Company (“Golden Eagle”) appeals from the district  
court’s order granting summary judgment to SWA Painting (“SWA”) on the grounds  
that: (1) the commercial general liability insurance policy (the “Policy”) entered into

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\* This disposition is not appropriate for publication and may not be cited to  
or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

\*\* The Honorable Frederic Block, Senior United States District Judge for the  
Eastern District of New York, sitting by designation.

between Golden Eagle and its insured, Coating Management Systems (“CMS”), a manufacturer and vendor of paint, covered and did not exclude losses resulting from CMS selling defective paint to SWA, a painting contractor; and (2) Golden Eagle was not entitled to challenge the reasonableness of a stipulated settlement entered into between CMS and SWA. We reverse and remand to the district court with the instruction to enter judgment for Golden Eagle dismissing the complaint.

## I

We need not decide whether application of defective paint physically injures the walls and/or homes on which the paint was applied under Arizona law because the Policy defines “property damage” to include “[l]oss of use of tangible property that is not physically injured,” Policy § V.15, and the parties do not dispute that homeowners lost use of their homes while the walls were repainted; thus, the losses incurred by CMS were covered under the “property damage” clause of the Policy.

However, the Policy excludes “[p]roperty damage’ to ‘impaired property’ . . . arising out of [a] defect, inadequacy or dangerous condition in ‘your product’ or ‘your work.’” Policy § I.A.2.m. Under the Policy, “[i]mpaired property’ means tangible property . . . that cannot be used or is less useful because [i]t incorporates ‘your product’ or ‘your work’ that is known or thought to be defective . . . if such property

can be restored to use by [t]he repair, replacement, adjustment or removal of ‘your product’ or ‘your work’.” *Id.* at § V.7.

Clearly the homes are tangible property and, at a minimum, they were less useful because of CMS’s defective paint; thus, the only issue is whether, as argued by Golden Eagle, the homes were restored to use by repair *or* replacement of CMS’s product, namely the defective paint. In this regard, SWA argues that the defective paint has not been repaired or replaced because: (1) the defective paint still sits on the walls, (2) sealant had to be used prior to application of the new paint, and (3) the new paint was not supplied by CMS.

We need not consider whether the defective paint was repaired because the plain and ordinary meaning of the term “replace” is dispositive. *See Liristis v. Am. Family Mut. Ins. Co.*, 61 P.3d 22, 25 (Ariz. Ct. App. 2002) (“We construe provisions of an insurance policy according to their plain and ordinary meaning.”).

The *Merriam-Webster Dictionary* (the “*Dictionary*”) defines the word “replace” as “1: to restore to good condition esp[.] by replacing parts or putting together something torn or broken[;] 2: to take the place of; supplant [;] 3: *to put something new in the place of.*” *Dictionary* at 593 (Henry Bosley Woolf ed., Simon & Schuster, Inc. 1974) (emphasis added).

Here, the homes were restored to use by replacement of the defective CMS paint with sealant and new paint, which “put something new in the place of” the defective paint. Replacement does not require that the defective paint be removed from the walls; nor does it preclude use of a sealant. Furthermore, neither the Policy nor the ordinary meaning of “replace” requires the defective CMS paint to be replaced by new CMS paint, as opposed to another brand.

## II

Consideration of Golden Eagle’s ability to challenge the reasonableness of the stipulated settlement is unnecessary because it is not liable for any part of the settlement between SWA and CMS. *See United Servs. Auto. Ass’n v. Morris*, 741 P.2d 246, 254 (Ariz. 1987) (*en banc*) (“If the insurer wins on the coverage issue, it is not liable for any part of the settlement.”).

**REVERSED AND REMANDED WITH INSTRUCTIONS TO ENTER  
JUDGMENT FOR GOLDEN EAGLE.**